

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
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Implementation of Section 10 of the )  
Consumer Protection and Competition )  
Act of 1992 )

MM Docket No. 92-258

Indecent Programming and Other Types )  
of Materials on Cable Access Channels )

REPLY COMMENTS

Introduction

The law firm of Cole, Raywid & Braverman, on behalf of the cable operators and associations listed below, hereby submit these Reply Comments in the above-referenced proceeding.

I. THE COMMISSION SHOULD NOT BE DETERRED  
IN THIS PROCEEDING BY THE CONSTITUTIONAL  
QUESTIONS SURROUNDING CABLE ACCESS CHANNELS

As many commenters in this proceeding have noted, the statutory provisions governing cable access channels are of questionable constitutionality. Unfortunately, the same problem plagues much of the new Act. But that should not deter the Commission from honoring Congress' statutory directive.

The Commission must be sensitive to first amendment concerns and do what it can to fashion constitutional regulations. This proceeding is not, however, the proper forum to thoroughly examine the legality of mandatory access channels.

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That issue is already being litigated in court. It makes little sense for the Commission to independently adjudicate the very same matter. Rather than attempting to second-guess Congress, the Commission should press forward with implementing regulations, and leave to the courts the task of resolving the underlying constitutional disputes.

**II. THE COMMISSION SHOULD ESPOUSE A  
FLEXIBLE CERTIFICATION APPROACH TO  
SATISFY SECTION 10'S MANDATE**

After reviewing the Comments, we restate our belief here that the Commission's implementing regulations should focus on the "certification" process. Self-certification as to programming content promises to be the most equitable and efficient means to ensure the appropriateness of access programming. The certification approach is not simply an attempt by cable operators "to pass the buck." Indeed, the Comments of the "Local Governments" (a group that includes the National League of Cities) support the certification approach as the most sensible option. The simple truth is that access programmers know the most about their programming and should assume primary responsibility for identifying its content.

Several PEG access groups have expressed concern that the certification process would unduly burden their operations. This fear is unfounded. Cable operators have no desire to burden PEG users with redtape.<sup>1/</sup> Ironically, this concern illustrates

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<sup>1/</sup> We support the suggestion that access users be allowed to certify periodically, rather than on a program-by-program

just how critical it is to place primary responsibility for content identification with access programmers. It would be vastly more burdensome for a cable operator to review all submitted access programs than for each programmer to submit a simple certification.

For the certification approach to work on a nationwide basis, it will require a good deal of flexibility. There are several points, however, that the Commission should make clear:

A. Operators Should be Authorized To Impose  
Ancillary Requirements on Programmer  
Self-Certification

Operators must be allowed to take reasonable steps to ensure that an executed certification is not a meaningless piece of paper. Most operators will presumably require programmer indemnification for any certification misrepresentation. In some cases, additional support for this indemnification will be necessary. Operators will ask that access programmers contribute to a master insurance policy (akin to broadcasters' liability insurance) or post a bond. Operators should also have discretion to impose penalties for willful or repeated misrepresentations, including prohibiting future program submissions. Finally,

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[Footnote Continued]

basis. Indeed, most users will be able to give an initial blanket certification and then bypass the modest paperwork obligation otherwise involved with each subsequent program submission.

operators must have the right to prescreen access programming. While most operators will choose to rely entirely on the certification process, they must retain the ability to look beyond those certifications and prescreen programming.

B. The Certification Approach Can Accommodate Live Programming

Several "pro-access" commenters complain that the certification approach is inconsistent with live programming, where it is difficult, if not impossible, to pre-certify as to programming content. We believe this problem has been vastly overstated and is easily remedied by a modest modification to the certification process. We suggest that sponsors of live programming need certify only that they will take reasonable efforts to avoid inappropriate programming and will accept legal responsibility if their efforts are unsuccessful. While some may protest that exposure, surely it makes more sense to place legal responsibility on the program producer (who can prescreen telephone calls, direct "on-air" conversations, etc.) than on the cable operator who merely transmits the program.

C. Good Faith Reliance on Programmer Certification Should Immunize Cable Operators From Liability

The Commission should make clear that good faith reliance on programmer certification meets an operator's obligations under Section 10 and immunizes the operator from any liability for that programming. This simple statement will remove any

legal uncertainty and bolster the certification approach in lieu of other approaches that would be both more intrusive on programmers and more burdensome for operators.<sup>2/</sup>

Moreover, in those limited cases where an operator feels compelled to reject a particular submission over the programmer's protest, the Commission's rules should expressly limit the programmer's remedy to future carriage. The editorial discretion afforded cable operators under Section 10 of the 1992 Cable Act would, after all, mean little if every exercise of that discretion exposed the operator to the risk of an assessment of consequential damages. The fear of such damages would effectively preclude the modest editorial process Congress sought to facilitate.

**III. THE COMMISSION SHOULD RECOGNIZE THAT  
SOME OPERATORS MAY STILL CHOOSE TO LIMIT  
THEIR INVOLVEMENT IN PEG ACCESS CHANNELS**

Section 10 instructs the Commission to promulgate regulations that "enable" a cable operator to restrict certain programming content on PEG access channels. The Commission regulations must guarantee an operator the ability to impose such restrictions, but must also preserve an operator's ability to refrain from doing so. If an operator elects to honor an

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<sup>2/</sup> Cable operators must continue to be exempted from all legal and financial responsibility for access programming outside their control. Because the 1992 Cable Act would not, for example, allow an operator to screen for defamation, no operator liability for defamation should be allowed.

agreement limiting its editorial control or delegating that control to a third party, the agreement should remain in effect. The elimination of the operator's statutory immunity for "obscene" material under Section 638 must be carefully considered by any operator. But if the operator, nevertheless, chooses to proceed in a fashion that limits its own direct review of PEG access programming, it should be permitted to do so.

**IV. THE COMMISSION SHOULD ESPOUSE A FLEXIBLE  
BLOCKING APPROACH TO SATISFY SECTION  
10'S MANDATE**

With regard to Section 10's "blocking" requirements, we urge the Commission to acknowledge that any technology that impedes customary television reception is acceptable. Operators should have free choice as to what technology makes sense for their particular system and local circumstances. They should not be required to "block" an entire channel, if a temporary "scrambling" approach would satisfy the statute's objective and still leave the vast majority of access programming readily available to all.

Because it will take time for operators to employ "blocking" technology and advise their subscribers of that option (the cost of which should be fully recoverable from access programmers), we support the commenters asking for an initial implementation date of 180 days from the conclusion of this rulemaking. During that transition period, operators would be

authorized to continue offering "indecent" leased access programming on an "unblocked" basis. This delay would by no means obligate an operator to carry such programming; the statute plainly gives the operator the ability to refuse carriage. The delay is simply a means of minimizing disruptions to existing leased access services that might eventually be offered on a "blocked" basis.

#### Conclusion

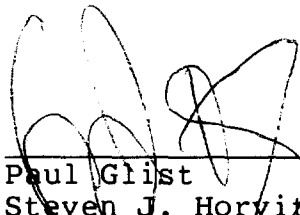
Section 10 of the 1992 Cable Act adds a new layer to the already troubling area of mandatory cable access channels. The Commission's primary objective in this proceeding must be limited to fashioning implementing rules consistent with congressional intent. To accomplish that end, cable operators must have discretion to unilaterally impose new operating requirements on access users. The Commission should make clear that Section 10, and the regulations adopted in this proceeding, preempt conflicting state and local laws, franchise provisions, and programming contracts.

-8-

Respectfully submitted,

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Helicon Corp.  
Jones Intercable, Inc.  
KBLCOM Inc.  
Monmouth Cablevision Assoc.  
TeleCable Corporation  
Texas Cable TV Association  
United Video Cablevision, Inc.  
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